from one court to another much less the giving of arbitrary powers to the Attorney-General in criminal matters which cannot be challenged as unconstitutional. Section 418A has to be tested by its own strength against the provisions of articles 4(1) and 8(1) of the Constitution. It is true that the powers given to the Public Prosecutor under section 418A are wide and absolute. These factors however do not by themselves invalidate the section. I agree with the learned Solicitor-General that the court should not adopt a doctrinaire approach in such matters. In other words no rigid principle should be formulated and applied to each and every case. Each case must be considered separately on its merits and in the light of its own particular facts and circumstances. It is thus important also to consider the results which ensue when the Public Prosecutor exercises his powers under section 418A of the Criminal Procedure Code. The position of the accused is not altered to his detriment in the slightest way. The criminal procedure and the rules of evidence remain the same. He loses no benefit whatsoever by the transfer of his case to the High Court and he retains his right of appeal to a superior court. In short the accused is not prejudiced in any way but would get a trial no less fair than he could have hoped for in the subordinate court. By the operation of section 418A the accused does not lose his fundamental liberty of being equal before the law and entitled to the equal protection of the law.

I am aware that recently in the High Court at Kuala Lumpur Abdoolcader J. declared section 418A as null and void for being *ultra vires* the Constitution. I must say that it is with regret that I have to disagree with him and arrive at a different conclusion and rule that section 418A of the Criminal Procedure Code is a good and valid law. In my judgment for the reasons that I have set out above section 418A is not *ultra vires* the Federal Constitution as its provisions do not violate article 8(1) or any other article in the Constitution. Therefore in the present case the Public Prosecutor's certificate requiring the subordinate court to transfer the case to the High Court was issued by the Public Prosecutor in the legitimate exercise of his powers under section 418A of the Criminal Procedure Code and it is incumbent upon the High Court to accept and take cognisance of this transfer. The preliminary objection taken by Mr. Yeap Ghim Guan on behalf of the accused is accordingly dismissed.

Preliminary objection dismissed.

Solicitors: *Yeap & Co.*

PUBLIC PROSECUTOR v. SU LIANG YU

[O.Cr.J. (Hashim Yeop A. Sani J.) August 20, 1976]
[Ipoh — Criminal Trials Nos. 11, 12 and 13 of 1976]

Criminal Law and Procedure — Transfer of case to High Court on certificates issued by Public Prosecutor under s. 418A of the Criminal Procedure Code (F.M.S. Cap. 6) — Whether valid — Whether s. 418A of the Criminal Procedure is in violation of art. 8 of the Federal Constitution — Criminal Procedure Code (F.M.S. Cap. 6), ss. 138, 376(1), 417 & 418A — Federal Constitution, arts. 8 & 145(3).

Legislation — Challenge as offending the guarantee of equality and equal protection of the law — Duty of court.

The Public Prosecutor purporting to exercise his power under section 418A of the Criminal Procedure Code issued a certificate on March 16, 1976 requiring the Sessions Court, Lumut to remove Warrant Case S.C. 21/76 and sixteen other cases involving the same accused then pending before the said Sessions Court to the High Court, Ipoh. In all these cases the accused was charged under section 4(c) of the Prevention of Corruption Act, 1961. The accused challenged the validity of section 418A and the certificate purporting to be issued under it as infringing article 8(1) of the Federal Constitution.

Held: (1) section 418A of the Criminal Procedure Code is a provision procedural in character and the exercise by the Public Prosecutor of his power under that section was not inconsistent with his power conferred by article 145(3) of the Federal Constitution and section 376(i) of the Criminal Procedure Code. The provision of section 138 of the Criminal Procedure Code has removed any prejudicial or hostile effect on any person subject to section 418A;

(2) section 418A of the Criminal Procedure Code was not invalid and the certificate issued by the Public Prosecutor under that section was likewise not invalid.

Cases referred to:—

(1) *Charanjit Lal Chowdhury* v. *Union of India* A.I.R. 1951 S.C. 41.

(2) *Kedar Nath* v. *State of West Bengal* A.I.R. 1953 S.C. 404 at p. 406.

(3) *Snowden* v. *Hughes* 321 U.S. 1.

(4) *Anwar Ali Sarkar's case* A.I.R. 1952 S.C. 75.

(5) *Budhan Choudhry* v. *State of Bihar* A.I.R. 1955 S.C. 191.

(6) *Mohamed Sidin* v. *Public Prosecutor* [1967] 1 M.L.J. 106.

(7) *Bidi Supply Co.* v. *Union of India* A.I.R. 1956 S.C. 479.

(8) *Plessy* v. *Ferguson* 163 U.S. 537.

(9) *Brown* v. *Board of Education* 347 U.S. 483.

(10) *Kathi Raning Rawat's case* [1952] 3 S.C.R. 435.

(11) *M.K. Gopalan & Anor.* v. *State of Madhya Pradesh* [1955] S.C.R. 168.

(12) *Long bin Samat & Ors.* v. *Public Prosecutor* [1974] 2 M.L.J. 152.

(13) *Moti Ram* v. *Union of India* A.I.R. 1966 Him Pra 25 (31, 32).

(14) *The Tata Oil Mills Co. Ltd.* v. *Commr., Ernakulam Municipality* [1964] Ker L.J. 450 (455, 456).

(15) *Sarju Pandey* v. *State* A.I.R. 1956 All 589, 594; [1956] Cr. L.J. 1152 (DB).

(16) *Public Prosecutor* v. *Khong Teng Khen*, Federal Court Special Case No. 1 of 1976, to be reported.

CRIMINAL TRIALS.

Tan Sri Datuk Haji Mohamed Salleh bin Abas (Solicitor-General) (*Datuk Haji Mohamed Eusoff Chin* and *Datuk Haji Abdullah Ngah* with him) for the Public Prosecutor.

Paramjit Singh (*S.I. Rajah* and *K. Chandran* with him) for the accused.

Hashim Yeop A. Sani J.: On March 16, 1976, the Public Prosecutor purporting to exercise his power under section 418A of the Criminal Procedure Code issued a certificate requiring the Sessions Court, Lumut to remove Warrant Case S.C. 21/76 and sixteen other cases involving the same accused, a Member of Parliament, then pending before the said Sessions Court to the High Court, Ipoh. In all the cases the accused is charged under section 4(c) of the Prevention of Corruption Act, 1961. The accused is now challenging the validity of the aforesaid section 418A and the certificate purporting to be issued under it as infringing Article 8(1) of the Federal Constitution. The question for decision is therefore whether section 418A of the Criminal Procedure Code as inserted by Act A324 of 1976 is in violation of Article 8 of our Constitution relating to equality before the law and equal protection of the law and therefore void.

Section 418A in short provides that notwithstanding the provisions of section 417 of the Criminal Procedure Code relating to the power of the High Court to transfer cases to itself or to another subordinate court the Public Prosecutor, exercising his power *personally*, may in any particular case triable by a criminal court subordinate to the High Court issue a certificate requiring the subordinate court before which the case is pending to remove it to the High Court at such place as may be specified in the certificate. Upon receipt of the certificate aforesaid the subordinate court shall without holding a preliminary enquiry cause the accused person to appear or to be brought before such High Court as soon as may be practicable.

Article 8(1) of the Constitution states that "All persons are equal before the law and entitled to the equal protection of the law." We are not concerned here with the exceptions provided in the other clauses. This article embodies a concept which is familiar in democratic constitutions. It is in fact an old concept originating probably in the 40th Article of Magna Carta ("to none will we sell, to none will we deny, to none will we delay right or justice"). This concept subsequently found expression in the forerunner of democratic constitutions — the U.S. Constitution, in the last part of the Fourteenth Amendment which states that "No State shall deny to any person within its jurisdiction the equal protection of the laws." More recent constitutions also carried this concept for example the Indian Constitution in its Article 14 and the Pakistan Constitution in its Article 4. The Fourteenth Amendment in the U.S. Constitution is reflected in a number of articles in the Indian Constitution. Although the Fourteenth Amendment does not contain the phrase "equality before the law" as in the Indian Constitution there is in fact no significant difference as a result. As tautological as both the Indian and the Pakistan provisions our Merdeka Constitution also emerged with the provision of Article 8(1) which provision was carried in toto into the Malaysian Constitution today.

The dominant idea in both the expressions "equal before the law" and "equal protection of the law" is that of equal justice. The meaning of these two expressions have been decided in a number of decisions of the U.S. Supreme Courts and also the Indian Supreme Courts and certain principles have been settled and accepted. Due to the demands caused by the complexity of modern government the doctrine of classification was evolved by the courts for practical purposes and read into the equality provisions. It has been accepted therefore that a legislature for the purpose of dealing with the complex problems arising out of an infinite variety of human relations cannot but proceed upon some sort of selection or classification of persons upon whom the legislation is to operate. In *Charanjit Lal Chowdhury* v. *Union of India*[1] Mukherjea J. said: —

> "It must be admitted that the guarantee against the denial of equal protection of law does not mean that identically the same rules of law should be made applicable to all persons within the territory of India in spite of differences of circumstances and conditions. As has been said by the Supreme Court of America, 'equal protection of laws is a pledge of the protection of equal laws.' (See *Yick Wo* v. *Hopkins*, 118 U.S. at 369) and this means 'subjection to equal laws applying alike to all in the same situation.' (Vide *Southern Railway Co.* v. *Greene*, 216 U.S. 400, 412). In other words, there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the same.... There can certainly be a law applying to one person or to one group of persons and it cannot be held to be unconstitutional if it is not discriminatory in its character. (See Willis Constitutional Law, p. 580). It would be bad law 'if it arbitrarily selects one individual or a class of individuals, one corporation or a class of corporations and visits a penalty upon them, which is not imposed upon others guilty of like delinquency.' (See *Gulf C. & S.F.R. Co.* v. *Ellis*, 163 U.S. 150 at 159). The Legislature undoubtedly has a wide field of choice in determining and classifying the subject of its laws, and if the law deals alike with all of a certain class, it is normally not obnoxious to the charge of denial of equal protection; but the classification should never be arbitrary. It must always rest upon some real and substantial distinction bearing a reasonable and just relation to the things in respect to which the classification is made; and classification made without any substantial basis should be regarded as invalid. (See *Southern Railway Co.* v. *Greene*, 216 U.S. 400 at 412)."

In the leading judgment of Sastri C.J. in *Kedar Nath* v. *State of West Bengal*[2] he said:

> "(6) Now, it is well settled that the equal protection of the laws guaranteed by art. 14 of the Constitution does not mean that all laws must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons or things for the purposes of legislation. To put it simply, all that is required in class or special legislation is that the legislative classification must not be arbitrary but should be based on an intelligible principle having a reasonable relation to the object which the legislature seeks to attain. If the classification on which the legislation is founded fulfils this requirement, then the differentiation which the legislation makes between the class of persons or things to which it applies and other persons or things left outside the purview of the legislation cannot be regarded as a denial of the equal protection of the law, for, if the legislation were all-embracing in its scope, no question could arise of classification being based on intelligible differentia having a reasonable relation to the legislative purpose. The real issue, therefore, is whether having regard to the underlying purpose and policy of the Act as disclosed by its title, preamble and provisions as summarised above, the classification of the offences, for the trial of which the Special Court is set up and a special procedure is laid down, can be said to be unreasonable or arbitrary and, therefore, violative of the equal protection clause."

The traditional and familiar test to be applied by the court when confronted with the question whether a particular provision of a statute is discriminatory and therefore infringing the equality provision

is that firstly it has to be seen whether it observes equality between all the persons on whom it is to operate. An affirmative finding on that point may not, however, be decisive of the issue. If the impugned legislation is a special law applicable only to a certain class of persons, the court must further enquire whether the classification is founded on a reasonable basis having regard to the object to be obtained, or is arbitrary. The phrases "with an evil eye or an unequal hand" and "intentional and purposeful discrimination" used in some American cases like *Snowden* v. *Hughes*[3] are not useful to establish violation of the equality provision either in the Indian Constitution or in our Constitution. Indeed in *Anwar Ali Sarkar's case*[4] Fazl Ali J. gave a warning against importing American decisions into an Article which makes no reference to intention. It has also been said that to maintain a challenge under Article 14 of the Indian Constitution it is not necessary to show intention to discriminate on the part of the legislature.

The settled law now is that for the test of permissible classification to be satisfied, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (2) that the differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases, namely, geographical or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act. — see *Budhan Choudhry* v. *State of Bihar*.[5] In *Anwar Ali Sarkar's* case, *supra*, Mukherjea J. said at page 88 that the classification should never be arbitrary, artificial or evasive. It must rest always upon real and substantive distinction bearing a reasonable and just relation to the thing in respect to which the classification is made for otherwise the classification made without any reasonable basis should be regarded as invalid.

Thus the equality provision in our Article 8 therefore, not unlike Article 14 of the Indian Constitution, is not really absolute for the doctrine of classification has been incorporated into it by judicial decisions. The doctrine of classification was imported into this country by the Federal Court in *Mohamed Sidin* v. *Public Prosecutor*[6] since 1967. Therefore in my view the true meaning of the equality provision under our Constitution is simply this: that no person shall be denied equality before the law or equal protection of the law but that clause shall not be construed so as to prevent Parliament from making a law based on or involving some classification provided that no real or actual discrimination occurs.

However in my view one difficulty in the task to interpret the equality provision is the difficulty to be precise since one is dealing with intangibles and therefore it is always impossible as Bose J. said, in *Bidi Supply Co.* v. *Union of India*[7] "to pin the thought down to any precise analysis." Therefore it has been said that the equality provision is in fact an attitude of mind rather than a precise rule of law. It embodies the awareness of something that exists but which cannot be pinned down to any precise analysis of fact save that in a given case it falls this side of the line or the other. Because of this difficulty decisions on the same point may vary as conditions or circumstances vary. Each case has to be decided on its own merits. There is no mathematical formula which can fit all cases. Thus there were compelling reasons in the United States for giving a narrower construction of the equality clause in order to preserve state rights but these considerations have no application in the other systems. Clause (1) of our Article 8 does not proclaim that all persons must be treated alike but only that persons in like circumstances must be treated alike. What constitutes a circumstance entitling the legislature to discriminate and what constitutes discrimination are questions of values to be decided by the court. That even these values may change from time to time is well illustrated by the decisions of the United States Supreme Courts on their celebrated doctrine of "separate but equal" in schools which doctrine persisted for nearly a century commencing with *Plessy* v. *Ferguson*[8] in 1896. Only in 1954 did the American courts denounce this doctrine in *Brown* v. *Board of Education*.[9] In the judgment of Chief Justice Warren he said that in approaching the problem, one could not turn the clock back to 1868 when the amendment was adopted, or even to 1896 when *Plessy* v. *Ferguson* was written but the court had to consider public education in the light of its full development and its present place in the American life. Shifts in attitude or approaches can also be detected in the decisions of the Indian Supreme Courts. When *Anwar Ali* was decided the majority of the judges in the Supreme Court considered "speedier trial" not an adequate basis for rational classification but in a matter of weeks after that the same Bench held in *Kathi Raning Rawat's case*[10] that public safety, maintenance of public order etc. to be adequate basis. Speedier trial was accepted subsequently in 1957. In *M.K. Gopalan & Anor.* v. *State of Madhya Pradesh*[11] where an officer of the Madras Government was prosecuted before a Special Magistrate appointed by the Government under section 14 of the Code of Criminal Procedure it was held that section 14 of the Code of Criminal Procedure in so far as it authorised the Provincial Government to confer upon any person all or any of the powers conferred or conferrable by or under the Code on Magistrates of the first, second or third class in respect of particular cases and thereby to constitute a Special Magistrate for the trial of an individual case, does not violate the guarantee under Article 14 of the Indian Constitution as the Special Magistrate in the case had to try the case entirely under the normal procedure and no discrimination of the kind contemplated by the decision in *Anwar Ali Sarkar's* case arose.

When a law is challenged as offending the guarantee of equality and equal protection of the law, the first duty of the court which is really a rule of common sense is to examine the purpose and policy of the statute and then to see whether a classification has been made and which does not result in a real or actual discrimination. In its approach to the problem the court ought *prima facie*, to lean in favour of constitutionality and should support the legislation

if it is possible to do so on any reasonable ground and it is for the party who attacks the validity of the legislation to place all materials before the court to show either the enactment or the exercise of the power under it is arbitrary and unsupportable. Procedural statutes are equally subject to the constitutional limitation as substantive laws unless the change in procedure is purely technical or formal. It was observed in *Anwar Ali Sarkar's* case that a rule of procedure laid down by law comes as much within the purview of Article 14 of the Indian Constitution as any rule of substantive law and it was necessary that all litigants, who are similarly situated, are able to avail themselves of the same procedural rights for relief and for defence with like protection and without discrimination.

Therefore whatever may be said of the United States and Indian Supreme Court decisions cited by both parties the following propositions still make good law: —

(1) When a law is challenged as infringing the Article, it is necessary for the court first of all to ascertain the policy and object of the statute concerned.

(2) Having ascertained the policy and object the court then if it is a special law examine whether there is reasonable classification.

(3) The reasonableness of the classification should be tested with reference to the circumstances existing at the time of the enactment of the statute.

(4) Procedural statutes are equally subject to the constitutional limitation as substantive laws unless the change in procedure is purely technical or formal.

(5) In the absence of a reasonable classification, substantial departures from the ordinary law of procedure in a criminal trial would offend against the Article but not minor changes which do not really prejudice the accused. In order to find out whether there has been a substantial departure from normal procedure, the test to be applied is not the degree of inequality, but the reality of it. There is no question of law being discriminatory unless it empowers the administrative authority, in its discretion, to impose a more onerous procedure than the ordinary one.

(6) A legislation which does not contain any provision which is directly discriminatory may yet offend against the guarantee of equal protection if it confers upon the executive or administrative authority an unguided and uncontrolled discretionary power in the application of the law.

(7) There is always a presumption in favour of constitutionality of an enactment and the burden is upon him who attacks the enactment to show that there has been a clear transgression of the constitutional principles.

(8) It must be presumed that the legislature understands and correctly appreciates the need of its own people and that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds provided however that while good faith and knowledge of the existing conditions on the part of the legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of holding that there must be some undisclosed and unknown reasons for the discrimination.

(9) Whether a particular piece of legislation is discriminatory should be determined in each case as it arises and no general rule can safely be laid down.

(10) Finally on the presumption of constitutionality a legislation is not to be struck down as discriminatory if any state of facts may reasonably be conceived to justify it. In order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived as existing at the time of the legislation.

Bearing in mind the foregoing principles let us examine section 418A of the Criminal Procedure Code. Section 418A of the Criminal Procedure Code was the result of an amendment in which legislative exercise other amendments were also made to the Criminal Procedure Code. Section 418A would seem to have been inserted during the committee stage in the Lower House and as a result the object and reasons for this enactment were not disclosed in the Bill. In the same legislative exercise section 417 of the Criminal Procedure Code was also re-enacted extending the scope but not the basis of this section. Section 417 before and after the amendment deals with the power of the judge to order a transfer of a case if it is made to appear to him that any of the grounds specified in that section is satisfied. Since the object and reasons of section 418A were not disclosed in the Bill we have to look at the character of the amendment. To get a proper perspective of section 418A that section cannot in my view be read in isolation. In the same legislative exercise that brought forth section 418A it can be seen that Parliament also amended section 417 and added new paragraphs (bb) and (dd). In the same legislative exercise Parliament also amended section 138 of the Criminal Procedure Code. To my mind it is clear that although the draftsman has provided a new section 418A the intention of the legislature would seem to be that section 418A be read as part of the legislative scheme of section 417 of the Criminal Procedure Code and therefore of the same character.

The Constitution was drafted when the Criminal Procedure Code was already in existence. Section 376(i) of the Criminal Procedure Code reads:

"376(i) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code."

Quite different from other constitutions our Constitution expressly provides for the powers of the Attorney-General and the Public Prosecutor. This appears in Article 145(3) which reads as follows:—

"145.(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial."

The words following the words "exercisable at his discretion" in clause (3) of Article 145 are "to institute, conduct or discontinue" any criminal proceedings. In my view it is not permissible for us to construe these three words disjunctively. Reading Article 145(3) together with section 376(i) of the Criminal Procedure Code which was in existence when the Constitution was drafted these would seem to disclose wide powers conferred on the Attorney-General in matters relating to criminal prosecutions other than prosecutions before a Muslim court, native court or a court-martial. The Federal Court had occasion to deal with this Article in *Long bin Samat & Ors.* v. *Public Prosecutor*[12] and although that case dealt with power of the Public Prosecutor to prefer one charge and not the other, Suffian L.P. referred to the powers of the Attorney-General as Public Prosecutor at page 158 in the following terms:

"In our view, this clause from the supreme law clearly gives the Attorney-General very wide discretion over the control and direction of all criminal prosecutions. Not only may he institute and conduct any proceedings for an offence, he may also discontinue criminal proceedings that he has instituted, and the courts cannot compel him to institute any criminal proceedings which he does not wish to institute or to go on with any criminal proceedings which he has decided to discontinue. (For the position in England, please see Viscount Dilhorne's speech at pages 32-3 in *Smedleys Ltd. v. Breed).* Still less then would the court have power to compel him to enhance a charge when he is content to go on with a charge of a less serious nature.

Anyone who is dissatisfied with the Attorney-General's decision not to prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts."

The legislature is presumed to know what it is legislating. In my view it was with these provisions in mind that the legislature especially took pains in subsection (2) of the new section 418A to state that the power of the Public Prosecutor shall be exercised by him "personally". I am inclined to the conclusion therefore that section 418A deals merely with procedure and is an integral part or an extension of section 417 of the Criminal Procedure Code and cannot on the face of it be said to be ultra vires the Constitution. The Criminal Procedure Code is a law relating to criminal procedure made by Parliament by virtue of its powers under paragraph 4 of the Ninth Schedule to the Constitution. Section 417 and section 418A are but vehicles for the Public Prosecutor to exercise his powers under Article 145(3) of the Constitution and section 376(i) of the Criminal Procedure Code. The exercise of his powers under section 418A is not inconsistent with his powers under the aforesaid provisions of the Constitution and the Criminal Procedure Code.

Since the exercise of the power of the Attorney-General as Public Prosecutor under section 418A is not inconsistent with the powers conferred upon him by the Constitution and the Criminal Procedure Code the burden on the person challenging the provision is in my view a heavy one for the person must show that the legislation visits him with a disability which is not imposed upon anybody else and that the procedure is a substantial departure from the ordinary law and not merely a change which does not really prejudice the accused. In the final analysis the test is on the reality of the change and whether the accused has been deprived of any safeguards which are open to others similarly situated and also whether the procedure imposed on him is a more onerous one than imposed on others similarly situated. In this case as a result of the issue of the certificate the accused will still be subject to the same procedure as any other person in the course of his trial.

The learned Solicitor General cited *Moti Ram* v. *Union of India,*[13] *The Tata Oil Mills Co. Ltd.* v. *Commr., Ernakulam Municipality*[14] and *Sarju Pandey* v. *State*[15] to support his contention that in this case the Constitution itself allows discrimination in the exercise of the power of the Attorney-General as Public Prosecutor under the Constitution. With respect I do not think I have to go so far looking for support in regard to the validity of section 418A. What I am saying is simply that the question of discrimination does not arise on the face of section 418A if it is viewed only as a vehicle provided by Parliament for the Public Prosecutor to exercise his discretionary powers over criminal prosecutions under the Constitution and the Criminal Procedure Code. Section 418A does not deal with the exercise of a power of an authority delegated by Parliament but with the exercise of a power conferred by the Constitution itself. If any person challenges the exercise of that power as discriminatory then the burden is on him to show that he has really been prejudiced or disabled or deprived of any valuable rights open or available to others similarly circumstanced. It is the contention of the counsel for the accused here that the section had deprived the accused of the valuable right of a preliminary enquiry. But with section 138 of the Criminal Procedure Code as it now stands the accused is not in an isolated position and he is not visited by a disability not imposed on others similarly situated.

My conclusion is therefore as follows. Section 418A is a provision procedural in character and the exercise by the Public Prosecutor of his power under that section is not inconsistent with his power conferred by Article 145(3) of the Constitution and section 376(i) of the Criminal Procedure Code. The provision of section 138 of the Criminal Procedure Code as it now stands has removed any prejudicial or hostile effect on any person subject to section 418A. Since writing this judgment I have had also the advantage of reading a copy of the majority judgment of the Federal Court[16] delivered by Suffian L.P. where he considered the validity of the certificate of the Attorney-General in respect of security cases under the Essential (Security Cases) Regulations, 1975 in Federal Court Special Case No. 1 of 1976 where that part of the judgment read as follows: —

"Mr. Wilson argues that this provision gives the Attorney-General an arbitrary power to discriminate against persons as to whom he has given such a certificate; but with respect I do not think that there is merit in this argument, because this power is consonant with the power expressly given to the Attorney-General by clause (3) of article 145 which reads:

"(3) The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial."

This court has dealt at length with this discretionary power of the Attorney-General in *Long bin Samat & Ors.* v. *Public Prosecutor.*"

Although in that reference the Federal Court was dealing with Emergency legislation made under Article 150 of the Constitution the observation above would seem to me to be of general application. Therefore I hold that section 418A of the Criminal Procedure Code is not invalid and the certificate issued by the Public Prosecutor under that section is likewise not invalid.

Order accordingly.

Solicitors: *Paramjit & Co.*

RE P.E. LONG @ JIMMY & ORS.; P.E. LONG & ORS. v. MENTERI HAL EHWAL DALAM NEGERI MALAYSIA & ORS.

[O.Cr.J. (Arulanandom J.) April 15, 1976]

[Penang — Miscellaneous Criminal Applications Nos. 5, 6 and 7 of 1976]

Criminal Law & Procedure — Habeas Corpus — Detention under Emergency (Public Order and Prevention of Crime) Ordinance, 1969 — Whether trafficking in drugs comes within the scope of Ordinance — Whether persons arrested informed of grounds of arrest — Opportunity to make representations — Whether detention unlawful — Emergency (Public Order and Prevention of Crime) Ordinance, 1969, ss. 3, 4 and 5 — Criminal Procedure Code (F.M.S. Cap. 6), s. 365 — Federal Constitution, art. 5.

Administrative law — Habeas Corpus — Detention under Emergency (Public Order and Prevention of Crime) Ordinance, 1969 — Whether valid — Federal Constitution, art. 5.

Interpretation of statutes — Preamble.

In this case the applicants had been detained under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. It was alleged that they were engaged in drug trafficking. The applicants applied for writs of habeas corpus on the grounds —

(1) that the applicants' detention was not within the scope and object of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969;

(2) that the applicants were not informed of the grounds of their arrest and therefore there had been contravention of the provisions of Article 5(3) of the Federal Constitution;

(3) that the applicants had not been given an effective opportunity to make representations against their detention;

(4) that the copies of the purported detention orders served on the applicants were not signed and were not under the hand of the Minister.

Held, dismissing the applications: (1) the preamble of the Ordinance declared that it was passed for securing public order, the suppression of violence and the prevention of crime involved in violence and although the preamble is not part of the Ordinance one can look into it to understand the scope of the Ordinance. It is clear that securing public order covers suppression of crimes which endanger the safety of the people and cause harm to society. Detention of persons found to be trafficking in drugs is therefore well within the scope of the Ordinance as it is a notorious fact that the trafficking in drugs causes serious harm and destroys the body politic not only nationally but also internationally;

(2) the evidence in this case showed that the detainees were informed by the officers who arrested them of the grounds of the arrest. In any event any complaint about the arrest of the applicants would appear to be purely academic and of no relevance to an application for a writ of habeas corpus against the detention by order of the Minister of Home Affairs;

(3) although the forms supplied to the applicants to enable them to make representations against their detention were defective, the facts showed that that it was not that the applicants were not given an opportunity to make representations against the order of detention but that they for reasons best known to themselves were not interested or did not want to make representations against the orders of detention;

(4) it was not necessary that the orders of detention be signed personally by the Minister;

(5) the orders of detention in this case which were made by the Minister were valid and not justiciable in the absence of proof of *mala fides.*

Cases referred to:—

(1) *Re Ong Yew Teck* [1960] M.L.J. 67.

(2) *Ooi Ah Phua* v. *O.C. Criminal Investigation Kedah/Perlis* [1975] 2 M.L.J. 198.

(3) *Kochuni & Ors.* v. *The States of Madras and Kerala & Ors.* A.I.R. 1960 S.C. 1080, 1081.

(4) *Burrakur Coal Co.* v. *Union of India* A.I.R. 1961 S.C. 955.

(5) *Sheikh Gulfan* v. *Sant Kumar* A.I.R. 1965 S.C. 1839.

(6) *Sundararamier & Co.* v. *State of Andhra Pradesh* A.I.R. 1958 S.C. 468.

(7) *Ashbury* v. *Ellis* [1893] A.C. 339.

(8) *Charles Russel* v. *Queen* (1881-2) 7 App. Cas. 829.

(9) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri* [1969] 2 M.L.J. 129.

(10) *Yeap Hock Seng* v. *Minister for Home Affairs* [1975] 2 M.L.J. 279.

CRIMINAL APPLICATIONS.

Karpal Singh (*K. Kumaraendran* and *R. Rajasingam* with him) for the applicants.

Abdullah bin Ngah and *Zaki bin Tun Azmi* (Senior Federal Counsel) for the respondents.

Arulanandom J.: These were three separate applications by the applicants for orders that writs of habeas corpus be issued to the respondents to have the applicants produced before the Honourable Court to undergo and receive, all and singular such matters and things as this Honourable Court shall then and there consider or concerning them on their behalf.

At the commencement of the proceedings counsel for the three applicants stated that the facts in all three cases were identical if not very similar and the law on which they founded their applications were identical. That being the case, it was agreed among them that there would only be one hearing on the matter and that all three applicants would abide by the decision as a result of the hearing of one application. The facts are as follows. Applicant in Criminal Application 5/76 one Patrick Eugene Long @ Jimmy, an American citizen, was on the 4th day of December 1975 arrested at the Holiday Inn, Kuala Lumpur. He was detained at the Circular Road Police Station until January 26, 1976 when he was brought to the Detention Camp at Pulau Jerejak, Penang. He was served with a copy of detention order under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and a copy of a statement under section 5(2)(b) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. He was also served with two notifications of right to make representations and two forms with regard to his making representations against his detention. The applicant in Criminal Application No. 6/76 one Donnie Lee Avila @ Danny,